FILED
JAN 6 1898
JAMES H. McKENNEY,
CLERK.

No. 20.

Brief of Richards & Speed for D. C.

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STATEMENT OF FACTS.

This appeal comes up on a decree of the supreme court of Oklahoma, affirming an order sustaining a demurrer to the petition in the district court. The petition is by a deputy marshal who entered Oklahoma before noon of April 22, 1889, intending to become immediately after that time a homestead entryman, and who immediately after noon of April 22, 1889, went to the quarter section of land adjoining Guthrie proper and proceeded to claim the land which was that day settled upon for town-site purposes by the inhabitants of East Guthrie.

The petition with great care sets out the fact that before the opening a person or persons, whose names are carefully omitted, inquired of men whom they supposed to be in position to know, whether persons in the Territory before time with commissions, or other authority for their entrance, such as deputy marshals, could, immediately after 12 o'clock on April 22, 1889, take and hold homesteads as against citizens who, starting from the line at 12 o'clock, entered as the acts of Congress and the proclamations of the President required. The petition says that the persons of whom these inquiries were made told the person who made the inquiries that they could so hold such land. The petition then, at page 3, states that Payne, "relying on these opinions and assurances, remained in the Territory as aforesaid," showing that Payne intended before noon of the 22d to take a homestead immediately thereafter.

The petition further states that immediately after 12 o'clock noon of the 22d of April, 1889, the plaintiff settled upon the tract of land in question, immediately began to dig a well, and on the next day made his application to the United States land office for the land.

The petition further states that "at the time he was engaged in digging a well" various other persons entered upon the land, and that numerous other parties came upon the land after it had been settled upon and occupied by the plaintiff as aforesaid and proceeded to stake off and occupy a large part of that land—all of it except ten acres (Record, pp. 16, 17)—as a town site; that there was an application for that land by persons who

claimed to represent a town-site company, which persons—not the town-site company—had entered the Territory before noon on April 22, 1889, and until noon of that day, and then came upon the land after plaintiff had settled upon it as aforesaid; that there was a contest in the land office for this tract between Payne and the settlers of the town site, and that Fitzgerald was also a party to the contest. That the Secretary found in favor of the town-site settlers and awarded the land to them, holding that Payne had entered the country prior to noon of the 22d of April, 1889, and was at noon in the country as a deputy marshal, and that "immediately after 12 o'clock noon of April 22, 1889, he went upon the land in question and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the land office and made his entry."

That the Secretary further found that the land office below had held Payne's entry for cancellation on the ground that he had entered the Territory prior to the time fixed in the proclamation of the President, and the Secretary found in favor of the town-site settlers.

The petition then avers that the Secretary erred in his construction of the acts of Congress, and that his decision was wrong as a matter of law; that the Secretary of the Interior appointed W. S. Robertson, John Foster, and A. C. Schnell as a special town-site board to prove up and enter the tract of land in trust for the inhabitants of East Guthrie, and execute deeds to the occupants as their respective rights and interests might appear, and that said Robertson, Foster, and Schnell as such special town-site board have proved up and entered the tract of land,

and obtained final certificate and patent therefor; and then (erroneously) alleges as a consequence thereof that "the legal title to said tract of land has passed from the United States and is now vested in the said defendants as aforesaid," and (truly) that said defendants have "the legal title thereto as a town-site board," and that said Fitzgerald claims the land as a homestead entryman. Prayer is that the court establish the right, equity, and title of plaintiff in and to the tract of land; declare and establish a resulting trust in his favor; that the defendants as a town-site board be by the court divested of legal title; and that the legal title be by the court vested in the plaintiff; and that the town-site board be restrained and enjoined from making deeds or conveyances for any part of that tract of land.

The defendants Robertson, Foster, and Schnell are not sued as town-site trustees, but in their individual capacity. Actual occupants of the lots upon the land are not made parties to the suit.

To this petition a demurrer was filed by Robertson, Foster, and Schnell for the reasons that—

First. The court had no jurisdiction of the persons of the defendants.

Second. The court had no jurisdiction of the subject of the action.

Third. That there is a defect of parties defendant, to wit, the actual occupants of the land in dispute, who claim it as a town site.

Fourth. The petition does not state facts sufficient to constitute a cause of action.

Fifth. That several causes of action are improperly joined.

Demurrer was sustained, and plaintiff appealed.

The decision was affirmed in the Oklahoma Supreme Court, and appeal was taken to this Court.

ARGUMENT.

1. This being a suit against Robertson, Foster, and Schnell as individuals, the trial court was correct in sustaining the demurrer.

If it was against them as officers of the Government, to wit, a board of trustees of the townsite of Guthrie appointed by the Secretary of the Interior under the act of Congress of May 14, 1890, then, of course, as was held in the *McDaid Case* (150 U. S., 209), those three defendants are "agents of the Government for the purpose of carrying out the trust thereby created to the extent and as specified, and this included the ascertainment of the beneficiaries in the first instance and the transfer of the property to them," and until these agents of the Government had ascertained the beneficiaries and had transferred the title to them they could not be sued and ordered to convey to some one whom the court considered they should convey to.

Apparently this court will never be done deciding, over and over again, the proposition that such officers can not be made parties defendant and in court litigate the question whether the petitioner or somebody else should be given the paper title to the land.

Since the time of *Litchfield* v. *Register and Receiver* (9 Wallace, 575), indeed since the time of *McClung* v. *Silliman* (2 Wheaton, 369), the decisions have been clear as language could make them, and yet they are again brought in question here.

As was said in the case in 9 Wallace as to the register and receiver:

> If they give patents to the applicants for pre-emption the courts can then, in the appropriate proceeding, determine who has the better title or right. To interfere now is to take from the officers of the land department the functions which the law confides to them and exercise them by the court.

And as the court then said: "This is precisely what this court has decided that no court shall do, but that after the land officers shall have disposed of the question then if any legal right of plaintiff has been invaded he may seek redress in the court." This case has been cited with approval many times—

Marquez v. *Frisbie*, 101 U. S., 474-475, and cases there cited.
Craig v. *Leitensdorfer*, 123 U. S., 210;
Carrick v. *Lamar*, 116 U. S., 426;
Koehler v. *Barin*, 25 Fed. Rep., 161–167;
Casey v. *Vassor*, 50 Fed. Rep., 259;
Railroad v. *United States*, 36 Fed. Rep., 612.

and the question has been decided in many other cases which we do not take the trouble to refer to this case.

The fact that the executive power must first exhaust itself is very clearly put in the cases of *Marquez* v. *Frisbie*, 101 U. S., at p. 475, and *Craig* v. *Leitensdorfer*, 123 U. S., pp. 210 and 211.

The same sort of attempt as this was made in the case of *McDaid* v. *Oklahoma, on the relation of Smith* (150 U. S., 209).

That was a suit to compel the town-site trustees of Guthrie to deed lots to Smith and Bradley, and the decision of this Court upon that point is conclusive. The trustees of that town-site board were held to be agents of the Government for the purpose of making the deeds (p. 219), and that until the trustees conveyed the title did not pass beyond the control of the Executive Department in that regard (p. 220). The principal effort on the other side in that case had been to show that the trustees were not agents for the Government, but agents for the town-site settlers, and the decision of the court against that contention was made with great emphasis at pages 218 and 219.

In this case it further appears that the district court was sitting in and for a county of the Territory, and not sitting as a district court of the first judicial district with the powers and duties of a district and circuit court of the United States, and is not such a court as can take jurisdiction of suits in which the United States or the United States officers are to be sued. In such case the service would be by the sheriff of the county, and might lead at once to friction between the local authorities and the national authorities. It certainly might lead to the absurd position of having the local court order its sheriff to imprison officers of the United States for obeying the Secretary of the Interior rather than some act of the legislature or order of some local court.

That such a suit will not lie in such a court was settled long ago in the case of *Nebraska Territory* v. *Lockwood* (3 Wallace, 236).

That was a case of quo warranto to determine the right of a person to exercise the functions of a judge of the supreme court of that Territory. The proceedings were in the name of the Territory and not of the United States. Upon demurrer the objection was held fatal, and in the last paragraph of the opinion in that case this objection was held to be well taken.

It will be seen that the form of the suit in that case and in this are substantially identical, and the principle is noticed in other cases, among them being *Marquez* v. *Frisbie*, 101 U. S., at p. 475, third paragraph.

2. The reason why the court has not jurisdiction of the subject of the action is very clearly set out in the cases already quoted from and cited, particularly—

Litchfield v. *Register and Receiver*, 9 Wallace, 575.
McCluny v. *Silliman*, 2 Wheaton, 369.
Marquez v. *Frisbie*, 101 U. S., 474, 475.
McDaid v. *Oklahoma*, 150 U. S., 219.

3. That there is a defect of parties defendant, and that the actual occupants of the lots are necessary parties, very clearly appears.

Litchfield v. *Register and Receiver*, 9 Wallace, 578.
Story Eq. Pleadings, sec. 207.
Sears v. *Hardy*, 120 Mass., 529.
Perry on Trusts, sec. 874.

Robertson, Foster, and Schnell, sued here either in their individual capacity, as the complaint states, or in

their official capacity, as will perhaps now be claimed, have no interest in defending this suit.

In the 9 Wallace Case the court referring to the register and receiver—who occupy as to quarter sections the same position that these defendants as trustees occupy as to the lots—say that this objection is fatal; that the register and receiver have no real interest in the matter, and that the bill shows that persons not named are asserting before the register and receiver the legal right to these lands; that these persons so asserting title in themselves are the real parties whose claims of right are adverse to the plaintiff; that if the court should hear the case and enjoin the register and receiver, the real claimants would have no further remedy; that before the register and receiver is the initial point for establishing their right, and that by such a suit, if permitted, valuable and recognized rights might be wholly defeated and destroyed without a possibility of a hearing on the part of the party interested; that these officers do not represent the claimants; that they might let the injunction be issued and thus by a proceeding to which the claimants are not parties strangle the incipient right of the actual settler on the public land.

The last paragraph of that case is a demonstration that the parties in interest, to wit, the occupants of the land, are necessary and indispensable parties in this suit. This case upon this point was followed, without being cited, in a number of cases, but has been cited upon this point very often.

4. That the petition does not state facts sufficient to constitute a cause of action is evident.

It alleges that the petitioner, relying upon what somebody told him, deliberately stayed in the country, intending at the time he so stayed to take a homestead.

Upon this point the case of *Smith* v. *Townsend* (148 U. S., 490) is exactly in point and conclusive against the plaintiff. This does not even have the favorable elements of the Smith Case. Smith not only came in good faith, but he brought his family with him, and he does not appear to have ever attempted to exercise his homestead right, but in the record in the case at bar it appears that, in fact, Payne's was a very flimsy claim at best. In his testimony in support of his homestead entry (Rec., p. 17), he says his family consists of a wife and daughter; they have not resided with him on the land; that his wife is a confirmed invalid and *would not remove to the land;* Newport, Ky., is her residence; that his residence on the land has been continuous except that he has been absent at different times attending to his duties as United States marshal for short periods; that all the land is occupied by trespassers (the town-site settlers), except about 10 acres, upon which he has raised crops, but what crops he does not say; that his property upon the claim on December 14, 1891, when he made the affidavit—after three crop seasons—consisted of one horse, household effects, some oats (evidently for the horse), and nothing else; that he had formerly homesteaded land at Garden City, Kans. This is the deserving farmer who, by profession a deputy marshal, farms with one horse, and without a plow, or a hoe, or a rake, or a wagon, or a barn, or a stable, or a chicken house, or a pig pen, or a fruit tree, or a garden, and whose invalid

wife is not able to remove to the land, but is compelled to remain at Newport, Ky., retaining the child with her; and who can not take the land and hold it as a home in good faith without breaking up his own family.

In his petition he alleges that the land is worth $10,000, yet he alleges on the 14th day of December, 1891, two years and a half after the country opened for settlement, that the total improvements put by him upon that land amounted to—including the labor—$185.

It can hardly be considered that such a farmer is one to be encouraged, or that public policy would be subserved by depopulating a town site in order to give him 160 acres of land in the heart of a town and fit only for town-site purposes.

He does not even pretend that he waited until the other citizens from the line came to this place, or that he did not avail himself of his opportunity while in the country to select a tract of land. The facts stated by the plaintiff make a stronger case against him than the case of *Smith* v. *Townsend* (148 U. S., 490), and the reasoning of the court in that case at pages 496 and 497 applies with even greater force in the case at bar.

The contention of the plaintiff, as is said in that case at page 500—

> would destroy absolutely that equality which was evidently the intention of Congress in the legislation. * * * The evident intention of Congress was by this legislation to put a wall around this entire Territory and disqualify to acquire under the homestead laws any tract within its limits everyone who was not outside of that wall on April 22.

> When the hour came, the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.

And the court there properly says at page 501 that it must be presumed that Congress knew that many persons were rightfully in the Territory—

> Indian agents, deputy marshals, mail carriers, and many others; and if it intended that these parties thus rightfully within the Territory on the day named should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intention to make the disqualifications universally absolute. * * * It can not be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have the special advantage of selecting tracts just outside that right of way, and which would doubtless soon become the sites of towns and cities. (Pp. 500 and 501.)

And the conclusion in that case is the proper conclusion in this case, that—

> one who was within the Territorial limits at the hour of noon of April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein. (P. 502.)

For the reasons herein given and upon the authorities herein cited it is respectfully submitted that—

First. Upon the statements in the petition Ransom Payne has brought suit in the district court of Logan County, not as a United States court, but on the Territorial side of the court, and that upon that side of the

court he can not sue officers of the United States. (*Lockwood* v. *Nebraska Territory*, 3 Wallace, 236.)

The court therefore had no jurisdiction of the persons of the defendants.

Second. The petition is unquestionably against Foster, Robertson, and Schnell in their individual capacity. If they were sued in their official capacity, the complaint should state that they were sued as trustees. In their individual capacity they are not liable to any action for what they do in their official capacity. In their official capacity they can not be sued before they have executed the deeds required by the law. (*McDaid* v. *Oklahoma*, 150 U. S., 219–220.)

In either case the court would have no jurisdiction of the persons of the defendants for the purposes of the petition.

Third. As trustees they were officers and agents of the United States for the conveyance of lots and held the title to East Guthrie as such trustees, and while so holding it under the act of Congress directing them to ascertain who the proper persons are they could not be sued in court and by an order of court be directed to convey to any person named by the court.

McDaid v. *Oklahoma*, 150 U. S., 218–219.
Litchfield v. *Register and Receiver*, 9 Wallace, 575.
Craig v. *Leitensdorfer*, 123 U. S., 210.
Marquez v. *Frisbie*, 101 U. S., 473.

Fourth. The court below, even if sitting with the powers of a United States court, would not have jurisdiction to divest the town-site board of the legal title and vest it in the plaintiff; establish in the plaintiff the

right, title, and equity to the land and decree a resulting trust in his favor, the board not having as yet deeded the land to anyone.

McDaid v. *Oklahoma*, 150 U. S., 219–220.
Marquez v. *Frisbie*, 101 U. S., 474.
Casey v. *Vassor*, 50 Fed. Rep., 259.

The court therefore had not jurisdiction of the subject of the action.

Fifth. The actual occupants of the town site were necessary parties to this action.

Litchfield v. *Register and Receiver*, 9 Wallace, 575.
Story, Equity Pleadings, sec. 207.
Sears v. *Hardy*, 120 Mass., 529.

Sixth. The petition shows that the plaintiff, a deputy marshal in the country, intending to take land, deliberately remained inside, although warned by the acts of Congress and the President's proclamation to go outside if he wished to take the land. Immediately after noon, on the day of the opening of the Territory, he began to sink a well upon land which was located as a town site while he was at work, 150 of the 160 acres in the quarter section being used as the town site and only 10 acres used by him as a farm; that in two and a half years—after three crop seasons—his farming apparatus consisted of no farming implements, machinery, or tools whatever, but simply of a place to sleep and a horse to ride; that the Land Department upon contest awarded the land to the town site; that, under the act of Congress in that behalf, the Secretary appointed a board of trustees to survey, plat, and deed the land to the actual occupants as a town site,

which that board was proceeding to do when suit was filed, the legal title being in them (so far as it is in such a board, as set out in *McDaid* v. *Oklahoma*, *supra*).

The prayer is now to take the title from those trustees and convey it to the petitioner.

No such case ever did occur. It is what the courts have steadily said never would be done.

The decree below should be affirmed.

HORACE SPEED.

JOHN K. RICHARDS,
Solicitor-General.

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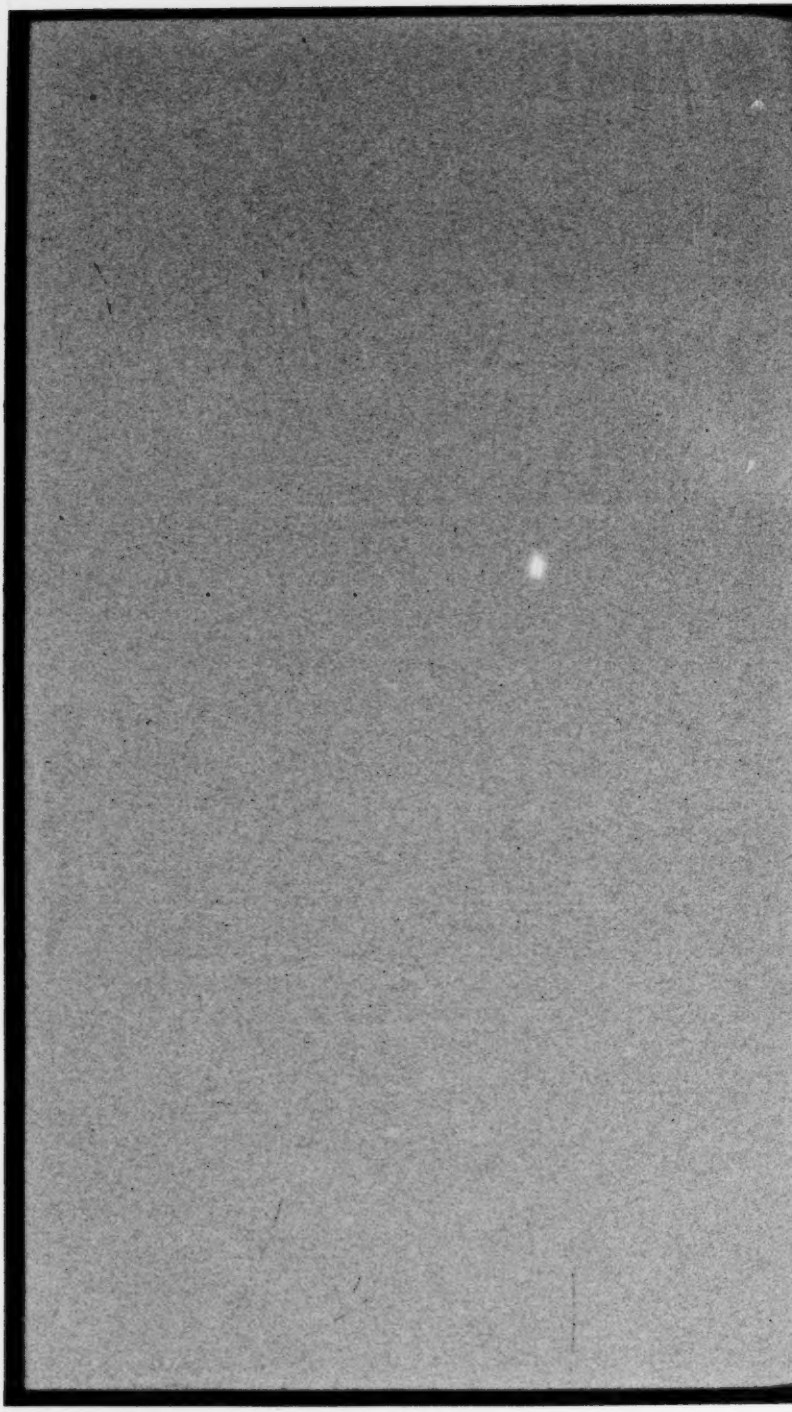
BRIEF FOR DEFENDANTS IN ERROR.



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BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was a bill in equity brought in the district court of the first judicial district of Logan County, in the Territory of Oklahoma, February 2, 1892, by Ransom Payne, appellant here, against W. S. Robertson, John Foster, A. C. Schnell, composing special town-site board No. 6, and Xenophon Fitzgerald, a homestead claimant, for the purpose of obtaining title to the northwest quarter of section 9, township 16, range 2 west of the Indian meridian, being a part of the town site of what was formerly known as East Guthrie, and now, and at the time the action was brought, included within the corporate limits of the city of Guthrie, in the county of Logan, and Territory of Oklahoma.

The bill, among other things, alleges that Ransom Payne, the appellant, was a United States deputy marshal, appointed prior to the passage of the act of March 2, 1889, providing for the opening of the Territory of Oklahoma to settlement, and prior to the proclamation of the President fixing the time for said opening; that Payne entered said Territory prior to April 22, 1889, and was on the present town site of Guthrie at noon of said day; that immediately after 12 o'clock noon of said day, April 22, 1889, he went upon the land in controversy and commenced his settlement as a homestead claimant; that on the 23d day of April, 1889, he filed a homestead entry on the above tract of land at the United States land office at Guthrie, Okla. The Commissioner of the General Land Office and the Secretary of the Interior held Payne's entry for cancellation on the ground that he had entered the Territory prior to the time fixed by the proclamation of the President, and decided in favor of the town-site settlers, and also dismissed the contest of the defendant Xenophon Fitzgerald.

The bill further alleges that W. S. Robertson, John Foster, and A. C. Schnell were appointed by the Secretary of the Interior as a special town-site board (No. 6) to prove up and enter said tract of land, in trust for the inhabitants, and to make and deliver deeds to the occupants thereof, as their respective interests might appear; that said defendants, as such special town-site board, have proved up and entered said tract of land and obtained final certificate and patent for the same, and that the legal title to said tract of land has passed from the United

States and is now vested in said defendants as aforesaid. The bill further alleges that the defendants W. S. Robertson, John Foster, and A. C. Schnell were about to commence making deeds for said tract of land to the various occupants who were claiming the same as a town site, and unless enjoined and restrained would make and deliver deeds to various persons for portions thereof, thereby clouding plaintiff's right and requiring a multiplicity of suits to set aside and cancel such conveyances and many actions at law to dispossess them.

The prayer of the bill is as follows:

> The plaintiff, being without any remedy at law, asks that his right, equity, and title in and to said tract of land be established; that a resulting trust be declared and established to said tract of land in favor of the plaintiff; that said defendants, as a town-site board, be divested of the legal title, and that the same be vested in the plaintiff, he being ready and willing, should the court so decree, to pay the $200 for said tract of land to said town-site board and to do equity on the premises; that said town-site board be enjoined and restrained from making deeds or conveyances for any part of said tract of land to anyone. (Rec., pp. 1–8.)

To this bill the defendants, W. S. Robertson, John Foster, and A. C. Schnell, interposed a demurrer on the ground that the court had no jurisdiction of said defendants or the subject of the action; that they were not proper persons to be made parties defendant; and that the bill of complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants. (Rec., pp. 19, 20.)

On the 9th day of January, 1893, the district court sustained the demurrer and dismissed the bill at the cost of the plaintiff. (Rec., p. 21.)

Payne appealed to the supreme court of the Territory of Oklahoma and on June 30, 1893, that court affirmed the decision of the lower court (Rec., p. 27), and from the latter decision this appeal was taken.

Pending the appeal of this case, the Secretary of the Interior removed W. S. Robertson, John Foster, and A. C. Schnell as trustees of the town-site board and appointed their successors on May 25, 1893, June 8, 1893, and June 15, 1893, respectively, as shown by the certificate attached. (Appendix, Exhibit A.)

The appellees, W. S. Robertson, John Foster, and A. C. Schnell, have not been, nor has any one of them been, a member of said board since July 22, 1893, and have had no connection personally or officially with the board since that date, as shown by the affidavit of John T. Taylor hereto attached (Appendix, Exhibit B), who was appointed by the Secretary of the Interior one of the trustees of said town-site board and on July 22, 1893, took the oath of office and entered upon his duties as the successor of W. S. Robertson.

ARGUMENT.

I.

The district court had no jurisdiction of the defendants or the subject of the action.

The defendants W. S. Robertson, John Foster, and A. C. Schnell were appointed by the Secretary of the Interior as trustees of the Town-Site board No. 6 assigned to

Guthrie, Oklahoma Territory, under the act of May 14, 1890 (26 Stat., 109, chap. 207), entitled "An act to provide for town-site entries of lands in what is known as Oklahoma, and for other purposes."

These trustees were officers or agents of the United States for the purpose of carrying out the trust thereby created, to the extent and as provided by the act of Congress, and this included the ascertainment of the beneficiaries in the first instance and the transfer of the title to them. While on the final entry the title of the United States was to be conveyed to the trustees, said conveyance was explicitly declared as made "for the uses and purposes in the act provided," and among those uses and purposes was the determination of the rightful claimants of the lots and the issuance of proper conveyances to them. In other words, the trustees were the instrumentality for the transmission of title from the United States to the rightful owners of lots or parcels of land within the town site.

In *McDaid* v. *Oklahoma Territory, ex rel. Smith* (150 U. S., 209, 220), Mr. Chief Justice Fuller, in delivering the opinion of the court, said:

> By the scheme of this act the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the Government until the rightful claimants and the undisposed of or surplus lands are ascertained. The act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these Government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department in that regard.

The bill shows on its face that the defendants were about to make deeds for the tract of land in controversy to various occupants who were claiming the same as a town site, and that the plaintiff sought to enjoin and restrain the making and delivering of deeds to the various persons who were rightfully claiming the various lots or parcels of land upon said town site. (See p. 8 of the record.)

The rule established in *Litchfield* v. *The Register and Receiver* (9 Wall., 575), that the courts will not interfere by mandamus or injunction with the exercise by executive officers of duties requiring judgment or discretion, in the case of a register and receiver of a United States land office, where it is the duty of such officers to determine who are the rightful claimants to certain lands, applies with equal force to trustees of town-site boards appointed by the Secretary of the Interior under the act of May 14, 1890.

Marquez v. *Frisbie*, 101 U. S., 474.
McDaid v. *Oklahoma*, ex rel. Smith, 150 U. S., 209.
Craig v. *Leitnsdorfer*, 123 U. S., 210.
Carrick v. *Lamar*, 116 U. S., 426.
Gaines v. *Thompson*, 7 Wall., 347.
The Secretary v. *McGarrhan*, 9 Wall., 298.

In *Marquez* v. *Frisbie*, Mr. Justice Miller, in delivering the opinion of the court, says:

> We have repeatedly held that the court will not interfere with the officers of the Government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. *Litchfield* v. *Register and Receiver*, 9 Wall., 552;

Gaines v. *Thompson*, 7 id., 347; *The Secretary* v. *McGarrahan*, 9 id., 298.

And we think it would be quite as objectionable to permit a State court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the Government, which would render its patents a nullity when issued.

After the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before. *Johnson* v. *Towsley*, 13 id., 72; *Shepley* v. *Cowan*, 91 U. S., 330.

II.

The bill should be dismissed because the defendants are not proper or necessary parties to this action.

Another objection equally fatal to the bill is the want of proper or necessary parties defendant to this action. It appears on the face of the bill that the defendants, who were trustees of the town-site board, appointed for that purpose by the Secretary of the Interior, have no real interest in the matter, but that divers persons not named in the bill, who are occupants and the rightful claimants to various lots upon the town site, were asserting claim to this tract of land; and that the trustees were about to issue deeds to them according to their respective interests. These occupants of the town site are the real parties whose interests are affected and whose rights are adverse to that of Payne.

These trustees sustain the same relation to the Department of the Interior as registers and receivers do, and hence the doctrine laid down by the Supreme Court in the case of *Litchfield* v. *Register and Receiver* (9 Wall., 578) is applicable to this case.

It has been shown in the statement of the case that the defendants, W. S. Robertson, John Foster, and A. C. Schnell, have not been members of said town-site board since July 22, 1893, and since this bill has been pending in this court they have had no connection personally or officially with said board or trust; that said defendants have been removed by the Secretary of the Interior, and their successors have been appointed and qualified; that the powers, duties, and trust of the said defendants, W. S. Robertson, John Foster, and A. C. Schnell, came to an end with their retirement from office, and their rights as officers, agents, or trustees of the Government in this cause ceased at that time, and that they have not been since said date and are not now proper parties defendant to this action.

In the recent case of the *Warner Valley Stock Company* v. *Smith* (165 U. S., 28), this court held that—

> A bill in equity against the Secretary of the Interior and the Commissioner of the General Land Office, to restrain them from exercising further jurisdiction with respect to the disposition of certain public lands, and from further trespassing upon the plaintiff's rights of quiet possession thereof, and to compel the Secretary to prepare patents therefor to be issued to the plaintiff, in accordance with law, and to the end that the plaintiff's title may be quieted and freed from cloud, and for further relief, abates, as to the

Secretary, upon his resignation of office, and can not afterwards be maintained against the Commissioner alone.

Secretary v. *McGranahan*, 9 Wall., 298, 313.
United States v. *Boutwell*, 17 Wall., 604, 609.
Commissioners v. *Sellew*, 99 U. S., 624, 626.
United States v. *Schurz*, 102 U. S., 378, 408.
Thompson v. *United States*, 103 U. S., 480, 484.
United States v. *Chandler*, 12[illegible] U. S., 643.
United States v. *Lamont*, 155 U. S., 303, 306.
United States v. *Long*, 164 U. S., 701.

In the case of *McDaid* v. *Oklahoma ex rel. Smith* (150 U. S., 209), it was held that the trustees therein were public officers or agents of the United States.

As the appellees referred to are not now public officers, no decree in this case can reach them, and as their successors can not be brought into the proceeding, and as no decree as prayed for in the bill could be sustained against the appellee Xenophon Fitzgerald, it is submitted that the action necessarily abates.

III.

Payne was disqualified from acquiring title to the land in controversy as a homestead entryman.

Having considered the questions of jurisdiction and want of proper parties defendant, we will now address ourselves to the questions involved on the merits, namely, the qualification of Payne to acquire title to the land in controversy as a homestead claimant.

In a contest proceeding before the Department of the Interior between the town-site settlers of Guthrie and the

appellant herein, Ransom Payne, and other homestead claimants, the Secretary of the Interior, on June 22, 1891, made the following finding of facts:

> Ransom Payne made homestead entry for the NW. ¼ of sec. 9, on April 23, 1889. Said Ransom Payne was a deputy United States marshal, duly appointed prior to the passage of the act of March 2, 1889, providing for the opening of the Territory of Oklahoma to settlement, and prior to proclamation of the President fixing the day for said opening, and he entered said Territory prior to April 22, and was there at twelve o'clock noon on that day, in obedience to orders issued by his superior officers, and he was there in the discharge of his official duties. *Immediately after twelve o'clock noon, on April 22, he went upon the land in question*, and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the local office and made his entry. So far as age, citizenship, etc., are concerned, he was a qualified homestead claimant, and he bases his claim upon his prior settlement. (*Guthrie town site* v. *Paine et al.*, 12 L. D., 654.)

The Secretary then says (id., p. 655):

> Neither Payne nor his counsel can deny that he took advantage of his presence in the Territory to go upon this tract of land before any other party could reach the same from the borders of the Territory where all law-abiding citizens had halted in obedience to the act of Congress and the proclamation thereunder.
>
> In no act relating to the public domain is the intention of Congress more clearly indicated than in the one under consideration, and that intention was to place all citizens and claimants on an absolute equality, so far as fixing the time when a claim to

land could be asserted and when the initiatory steps toward asserting such claim could be taken. To hold that depaty marshals, trainmen, and others who happened to be within the limits of the Territory in the discharge of their duties and in the receipt of the salary and emoluments of their position at the moment the lands were opened to settlement could take advantage of that fact, and, in advance of others, immediately enter upon desirable tracts to the exclusion of those who had in obedience to law remained outside of the Territory, would be a violation of the clearly expressed intention and spirit of the act. In my opinion, such an interpretation is too unjust to be entertained. The facts in relation to the opening of this country were known to all. Parties who occupied positions similar to that occupied by Payne had abundant opportunity to qualify themselves as claimants by withdrawing from the Territory and placing themselves on a par with others had they so desired. This Payne declined to do, but sought to take advantage of his position to anticipate the arrival of any other claimants from the point they had occupied in obedience to law. This he can not be permitted to do under the law. Had Payne declined to make an act of settlement until after sufficient time had elapsed for those waiting on the border to reach the point in controversy, and thus placed himself on a par with other claimants, a far different state of facts would have existed, and a different rule might have been applied in the consideration of his claim; but under the present state of facts there is neither equity nor law on his side, and your decision canceling his entry is affirmed.

It is asserted in the brief of counsel for appellant that as Payne was lawfully within the Territory at noon

on April 22, 1889, he had a right to make homestead settlement on the land in controversy at the time and in the manner he did, and that he was not disqualified to do so under the provisions of the act of Congress of March 2, 1889.

We concede that for the purpose of acting as deputy marshal of the United States Payne could have been lawfully in the Territory, and upon the present town site of Guthrie, at the hour of 12 o'clock noon of April 22, 1889, but for the purpose of taking and acquiring title to the tract of land in controversy under the homestead laws of the United States, his presence at that time and place was expressly forbidden by the acts of Congress of March 1 and 2, 1889, and the President's proclamation issued in pursuance thereof, and his attempted acts of settlement and homestead entry were therefore unlawful and a nullity.

Payne states he was at Guthrie at noon on April 22, 1889, in obedience to an order from his superior officer, the United States marshal for the district of Kansas, and in the discharge of his duty as a deputy marshal he was near the United States land office at Guthrie, for the purpose of maintaining peace. (Appellant's brief, p. 2.)

There is no question but that Payne was sent to Guthrie and authorized to be there for that purpose. The record in this case, however, shows that immediately after 12 o'clock noon on said day, Payne entered upon and made settlement on the land in controversy, and on the next day, April 23, 1889, he made homestead entry No. 4 at the United States land office in the city of

Guthrie, during all of which time he was supposed to be acting and performing the duties of the position of assistant United States marshal.

No doubt Payne was extremely solicitous in enforcing the law and maintaining the peace within the Territory of Oklahoma up to 12 o'clock noon on April 22, 1889, at which time all would-be settlers were detained by the statute and the President's proclamation outside the borders of the Territory, and could not lawfully be where he was, on the town site of the present city of Guthrie. But when 12 o'clock came, and the Territory was thrown open, and the people began to arrive—in other words, when his services as a deputy marshal were needed—he assumed to throw off his official character and as a private citizen attempted to make a settlement upon the land in controversy, filing his homestead entry the next day. He was playing a slick game with the law. Now he was a deputy marshal, and now a private citizen. He was a deputy marshal to get into the Territory and be on a valuable town site at 12 noon; he was a citizen when 12 noon arrived to make his entry and beat the law-abiding citizens who were hurrying at that time from the border line into the Territory.

Counsel for the appellant contend that the true test of the qualification of the entryman under the statute is the question of advantage, relying upon two recent decisions of the Secretary of the Interior, *in re Jacob Kaufman* (21 L. D., 370) and *Hershey* v. *Bicksford et al* (23 L. D., 522).

An examination of the Kaufman Case discloses that the ruling of the Secretary was based upon the following facts:

> One Dunham went to the Territory of Oklahoma in February, 1888, as an employe of the A. T. & S. F. R. R. Co., and remained in said Territory and in the employe of said company ever since. He did not attempt to take up any land when the same was opened for entry, April 22, 1889, and in fact was not at that time of lawful age. November 1, 1890, he bought the improvements on said land from one Williams, a prior entryman, paying him four hundred and fifty dollars therefor, and upon Williams relinquishing his claim to said land, Dunham entered the same.

It will be observed that this was a year and a half after the opening, and that he took no advantage of his presence therein to secure a settlement claim.

The facts in the Bickford Case show that he was in the Territory on April 22, 1889, as a Government contractor and flour inspector, and that he remained in the Territory engaged in said business until his contracts had expired in June or July, 1889, and did not attempt to assert any right or claim to any land until December 31, 1890, when he made application to file upon a homestead.

In each of these cases the Secretary of the Interior finds the party derived no advantage whatever. In the Dunham Case the entryman was a minor, and could not have made a homestead entry had he been otherwise qualified, and did not assert any claim to any land until nearly two years after the opening of the Territory. In

the Bickford Case the entryman was lawfully within the Territory, and clearly gained no advantage by his presence, as he did not assert any right or claim to the land in question until a year and a half after the Territory had been open to settlement. The Secretary therefore distinguishes these two cases from the doctrine promulgated by the Supreme Court of the United States in the case of *Smith* v. *Townsend*, *supra*, and holds that both of these parties were qualified entrymen.

The true construction of the statute here involved is given in the opinion of Mr. Justice Brewer in the case of *Smith* v. *Townsend* (148 U. S., 500):

> The evident intent of Congress was, by this legislation, to put a wall around this entire Territory and disqualify from the right to acquire, under the homestead laws, any tract within its limits, everyone who was not outside of that wall on April 22. When the hour came the wall was thrown down and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.

But applying the doctrine of advantage and giving this statute the widest possible construction, Payne is certainly disqualified, because the Secretary of the Interior found as a fact that Payne "*immediately after 12 o'clock noon on April 22 went upon the land in question and commenced to dig a hole in the ground for a well, and upon the next day made his homestead entry.*" (*Guthrie Townsite* v. *Paine et al.*, 12 L. D., 654.)

In the same opinion the Secretary further says: "Neither Payne nor his counsel can deny that he *took advantage of his presence in the Territory to go upon this*

tract of land before any other party could reach the same, from the borders of the Territory, where the law-abiding citizens had halted in obedience to the act of Congress and the proclamation thereunder."

The findings of fact and conclusions of law by the Secretary of the Interior conclusively determine this case.

The doctrine has been firmly established by this court that, in the absence of fraud or imposition, the findings of the Secretary of the Interior are conclusive upon all questions of fact as to land claims submitted to him for his decision.

Lee v. *Johnson*, 116 U. S., 48.
Bohall v. *Dilla*, 114 U. S., 47.
Baldwin et al. v. *Starks*, 107 U. S., 463.
Steele v. *Smelting Co.*, 106 U. S., 447.
Smelting Co. v. *Kemp*, 104 U. S., 636.
Quinby v. *Conlan*, 104 U. S., 420.
Vance v. *Burbank*, 101 U. S., 514.
Marquez v. *Frisbie*, 101 U. S., 473.
Moore v. *Robbins*, 96 U. S., 530.
Shepley v. *Cowan*, 91 U. S., 330.
Johnson v. *Towsley*, 13 Wallace, 72.

It is therefore submitted that the decision of the supreme court of Oklahoma Territory was right and should be affirmed.

BAYARD T. HAINER,
City Attorney of Guthrie.

JOHN K. RICHARDS,
Solicitor-General.

APPENDIX.

EXHIBIT A.

UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 14, 1897.

I, Cornelius N. Bliss, Secretary of the Interior, hereby certify that William S. Robertson, Andrew C. Schnell, and John Foster were removed from their positions as trustees for town-site entries of lands in the Territory of Oklahoma, and that their successors were commissioned June 8, 1893, June 15, 1893, and May 25, 1893, respectively.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

C. N. BLISS,
Secretary of the Interior.

10607——2

Exhibit B.

In the Supreme Court,
Territory of Oklahoma, *Logan County, ss:*

The affiant, J. T. Taylor, states that he was appointed by the Secretary of the Interior one of the trustees of townsite board No. 6, Oklahoma Territory, and by authority of said appointment he did, on the 22d day of July, 1893, take the oath of office and entered upon his duties as such trustee under said appointment, and has continuously ever since said date held the office of trustee of said townsite board No. 6.

The affiant further states that John W. Foster, W. S. Robertson, and A. C. Schnell, defendants in this action, have not been nor has any one of them been a member of said board since July 22, 1893, and have had no connection personally or officially with said board since said date.

John T. Taylor.

Subscribed and sworn to before me by J. T. Taylor, this 7th day of June, 1897.

[seal.] Alfred T. De Witt,
Deputy District Clerk, United States District Court, First District, Oklahoma Territory.

REPLY BRIEF

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

RANSOM PAYNE, APPELL[illegible],
v.
WILLIAM S. ROBERTSON ET AL. } No. 20.

BRIEF IN REPLY TO APPELLANT'S BRIEF.

STATEMENT OF FACTS OPENED UP BY APPELLANT'S BRIEF.

The petition of appellant (Record, pp. 1–19) by direct averment, or by inference, or by omission, showed all the essential facts of the case.

All possible doubts are resolved by the averments of his brief, which quotes from the Secretary's findings in the case (*Guthrie Townsite* v. *Payne*, 12 L. D., 654) when before him, and refers to the plats of the public lands survey covering the Guthrie tracts.

By the Secretary's decision, quoted from in the brief at pages 7 and 8, it appears that not only did the Secretary find Payne disqualified because he was a deputy

marshal, who, intending before the opening to take land when the time of opening arrived, deliberately remained in the country, in violation of the act of Congress and the proclamation of the President, but that Payne, with knowledge of all the facts, had abundant opportunity to qualify himself as a claimant to homestead public lands by withdrawing from the Territory and placing himself on a par with others, had he so desired; that he declined to do this, but *sought to take advantage of his position* to anticipate the arrival of any other claimants from the point they had occupied in obedience to law. Referring to that decision (12 L. D., 654) so quoted from, we find that the Secretary further found that the tract was needed for town-site purposes, which fact was known to all the people the day before the opening; and that Payne attempted to settle on the land not in good faith for agricultural purposes, but for speculative purposes, in order to sell the land for lots to the lot occupants. (12 L. D., 654, 656, 657, 659, 661.)

Some of these findings do not at first reading show that they apply to Payne, but at page 655 the Secretary inclusively says, "The facts were known to all;" and at page 657, "The waiting crowds knew all these facts, and they knew that the land in controversy must be used for the homes, the business, and the trade of the people who would compose the population of this coming town."

This finding covers Payne. The decision also shows that the "land in controversy," referred to by the Secretary, was all of sections 8 and 9, and that the tract claimed by Payne was one of the interior quarter sections,

its southwest corner being at the geographical center of the town, the town being now the city of Guthrie, the capital of Oklahoma Territory, and covering all of those sections.

The brief also admits (p. 24) that the tract was "on quite a hill and far from being a desirable agricultural claim." The petition and brief both state that the value of the quarter section was over $10,000, and that Payne's improvements were only worth $185. (Record, pp. 8, 17; Brief, p. 5.) The brief also says (p. 25) that at noon Payne was on the Government acre and not on the tract he now claims.

The explanation of this allegation is, that while the tract he claims does contain the acre fixed for the United States land office by the proclamation of the President opening Oklahoma, dated March 23, 1889 (26 Stat. L., 1546), yet the land office was in fact located on the adjoining quarter section under a subsequent letter from the President to the Commissioner of the General Land Office. Payne must have known, therefore—he does not deny that he did know—the fact which the Secretary of the Interior in his decision says was known by all intending settlers, that "the land in controversy (this and adjoining tracts) must be used for the homes, the business, and the trade of the people who would compose the population of this coming town." (*Guthrie Town Site* v. *Payne et al.*, 12 L. D., 657.)

This court, which takes judicial notice of all facts dependent upon general information and intelligence, will readily see that this tract of land alleged in the bill

and brief to be worth $10,000 is not worth $10,000 for agricultural purposes, but can be worth that amount only for town-site uses. If this is not a "choice claim" in some rich river bottom (Payne's brief, p. 24) and is "far from desirable for agricultural purposes" as admitted in the brief at page 24, then the only use Payne had for the claim was, as the Secretary held in the case—12 L. D. at pp. 558–559—as to the other Paine "that the claim was taken for speculative purposes only to enable him to dispose of the land for town-site purposes, and that it was not taken for agricultural purposes."

The brief says, indeed, at page 24, that Payne's duties kept him close to the local land office, so that he could not mount his horse and ride to some rich river bottom. There is no averment that he wanted a rich river bottom, nor any averment nor any showing that a rich river bottom was not in easy reach, where the public maps and the land-office records of the official survey show the Cottonwood Creek and the Cimarron River flow within a half mile and a mile, respectively, of the land he now claims, and if "the records of the official survey" are matters of which the court will take judicial notice, as suggested in Payne's brief, at page 24, the court will from them notice that Payne went as far to get on the land he now claims as he would have needed to go if he had gone upon the fertile creek valley claim adjoining Guthrie on the north or that on the southwest. If he was under "orders" to preserve the peace at Guthrie, he violated his "orders" by leaving Guthrie at all. If he violated his orders by going a half mile, he can not claim

credit that he there stopped and with the settlers wrangled (Rec., p. 4) over that tract, "far from desirable for agricultural purposes," but valuable for town-site purposes. If he violated his "orders" at all, he could lessen his fault only by going to the fertile valley of the Cottonwood or Cimarron and there, upon a tract fit for agricultural purposes, settle peaceably and without altercations.

But petition and brief show further that before the opening Payne intended to settle on land in Oklahoma and carefully learned that certain officers of the Government, in conversation and by letters, had stated that persons going into and remaining in Oklahoma on "official duty" would not be barred from taking lands (Record, p. 3; Brief, pp. 2–3), and he "relied on" those opinions and assurances and remained in the Territory (Id., p. 3). The necessary meaning of this is that if he had not "relied on" them he would have gone out of the Territory. So in the estoppel idea at brief page 23. But that is theorizing after the fact. Payne knew, as everyone knows, that a deputy marshal is not an "officer" of the United States in any such sense as the brief suggests. Deputies are appointed by the marshal. They have no term of office. He pays them. If he fails to pay them they can not sue the United States for pay. If he directs them to do any act they can refuse, and there is no statute requiring them to obey or punishing them for not obeying. They are practically hired and paid by the job. (See U. S. Rev. Stat., 829–830.) The marshal was their employer. If any of them wished to homestead lands in Oklahoma

no law or fact prevented them from qualifying themselves for it, as the statute and the President's proclamation required of all intending settlers.

HOMESTEAD QUALIFICATIONS.

The suggestion (Payne Brief, pp. 8, 9) that the homestead privilege belongs to every American citizen is wholly erroneous. But a small part of the citizens have the qualifications. To homestead, the citizen must—

First. Be the head of a family or 21 years of age; not a woman living with her husband.

Second. Desire the land for agricultural purposes, actual settlement and cultivation, not for speculation.

Third. Intend to live on it as a home permanently.

Fourth. Not have used the right theretofore. (U. S. Rev. Stat., secs. 2289–2290.)

These are requisites of qualification. Without them the most estimable citizen could not take land under the homestead laws. So the provisions of the statute of 1889 and the President's proclamation thereunder are requisites of qualification. The point was expressly decided in *Smith* v. *Townsend*, 148 U. S., 497–501.

OFFICIALS WERE DISQUALIFIED TO HOMESTEAD.

But it is evident that persons with power of officials of the United States in charge of the opening, within the land to be opened, should not be deemed qualified to contest, in the race for prior settlement, with intending settlers held by the law at the line. Such men must be disinterested, and are by the very necessity of their duty

barred from participating in the contest for the matter desired. They occupy positions of trust, and must do no act and have no interest which can conflict with the trust duty. It is notorious that the deputy marshals who attempted to take lands did, as the brief for Payne shows he did, quit their posts of duty and come into conflict with the settlers at the critical moment when they should have been at their posts of duty performing the duty they were sent into the Territory to perform. They were sent to preserve peace. They took positions, and before the settlers could come from the line or begin the altercations they were sent to prevent, the deputies made off from their posts of duty and attempted to make profit for themselves without regard to their duty.

To make such provisions by statute that the officials in charge of that opening should be wholly disinterested was most natural and right, and simply on a par with the provision that trustees shall not buy at the trust sale, or that a judge shall not act where he has a right or interest in the subject-matter adverse to any party to the case. In those instances the trustee does not forfeit any right; the judge does not forfeit any right. They simply are by the rule delivered from any temptation to do wrong.

If the persons legally inside the Territory could have each taken a claim at noon and the settlers be held at the line until noon, it would have tended to conflict between duty and personal interest, and would have been most unfair to those at the line. Enough people were legally inside the Territory to take all the choice claims in the

country opened. The statute intended to prevent these evils; its enforcement has largely prevented them.

The attempt to distinguish this case from *Smith* v. *Townsend*, *supra*, is not successful. This case is more completely within the statute. Payne went into the country, after the act of Congress and the President's proclamation, for the purpose of preserving peace at the opening. (Payne's brief, p. 1–2.) He intended, before the opening, to take land when the hour of opening came. He does not deny, but by inference admits, that he so intended at the time he went in. (Brief, p. 12.) He admits that when the hour of opening came, he deserted his post and his duty. (Payne's brief, p. 2.) Payne's case is unlike the cases cited of Bickford and Dunham. They did not intend before and at the time of the opening to take land; they did not take land in that race. Payne tried to take this land at that time.

PAYNE'S INTENT WAS SPECULATIVE.

But Payne's claim was from the first speculative, and is to-day. The land was settled on the opening day as a town by the name of East Guthrie. This the petition and brief and the Secretary's decision fully recognize. Before the petition was filed the land had been patented as a town site, platted into lots, blocks, streets, and alleys; and trustees appointed by the Secretary under the act of Congress were about to deed the lots to the actual occupants. This the petition and brief also show and complain of. (Record, p. 6.)

It is right to recognize the fact that the present fight of Payne is not with the hope of gaining this land,

"far from desirable for agricultural puposes," for agricultural purposes. He does not hope to eject the people, move off the houses, close the streets, and on the ruins of the town raise hogs and corn. It is not worth the expense of this suit for that purpose. It can be worth the expense of this suit only for the purpose found by the Secretary in the decision by him (12 L. D., pp. 658–659), "speculative purposes only," to enable him to dispose of this for town-site purposes, not for agricultural purposes and for a home as contemplated by the homestead law" * * * "to enter it as a homestead and then sell it to them at his own price."

Payne can not to-day take, nor could he at any time have taken, as to this tract, the oath required of homestead entrymen—that he desires the land "honestly and in good faith for the purpose of actual settlement and cultivation * * * and that he will faithfully and honestly endeavor to comply with all the requirements of law as to residence, settlement, and cultivation, * * * and that he does not apply to enter the same for the purpose of speculation." (26 Stat. L., p. 1098, sec. 2290.) This statute simply restates the spirit of the former law (12 L. D., p. 657, first paragraph). "Speculative purpose" is bad faith and has barred many shrewdly devised applications for lands adjoining town sites. Excellent illustrations and statements of the principle are found in

Dayton v. *Dayton*, 6 L. D., pp. 167–168.
Same v. *Same*, 8 L. D., pp. 253–254.

SECRETARY'S CONCLUSIVE FINDINGS.

The acts, the knowledge and the purpose (or intent) of Payne are questions of fact, and they have been conclusively found by the Secretary in the case above cited. (12 L. D., at p. 654).

The Secretary finds as facts that Payne was in the Territory before noon of the 22d, and immediately after noon went upon the tract of land in dispute; "he took advantage of his presence in the Territory to go upon this tract of land before any other party could reach the same from the borders of the Territory." * * * "Payne had abundant opportunity to qualify himself as a claimant by withdrawing from the Territory and placing himself on a par with others had he so desired." * * * "This Payne declined to do, but sought to take advantage of his position to anticipate the arrival of any other claimants from the point they had occupied in obedience to law. This he can not be permitted to do." (Id., pp. 655-656.) That this land was needed for townsite purposes, and that Payne knew all these facts. (Id., p. 557.)

These findings of fact are conclusive upon Payne. His brief refers to these findings as conclusions of law, but questions of knowledge, good faith, and speculative intent are always questions of fact, conclusively presumed sometimes, but always as facts.

Lee v. *Johnson*, 116 U. S., 52.
Carr v. *Fife*, 44 Fed. Rep., 716.

Under these findings Payne certainly—
First. Was not qualified to take lands.

Second. Took advantage of his official position.
Third. Acted with a speculative intent.
Fourth. Acted not in good faith as a homestead settler.

PAYNE'S PETITION WITHOUT MERIT.

Payne's petition is without merit; it is unconscionable; he asks a court of equity to ruin a town upon what by the most favorable view of his own showing would be a bare technicality. Baldly, his claim is that equity should give him a tract of land where now is a living town of thousands of people upon the ground that he got first to the land, "began to dig a hole," and next day filed on the land. There is not one statement of merit in his claim. He has made no recompense to the Government for such a favor. Granting his petition would not increase the common wealth, but decrease it by just so much as a quarter section, "far from desirable for agricultural purposes," (see Payne's brief, p. 24) is worth for such uses less than when it is part of the capital town of a growing Territory.

If a court of law could grant such relief it would be deemed a harsh, hard measure.

This court has taken its stand in much more meritorious cases in equity.

In *Mississippi Railway* v. *Cromwell*, 91 U. S., 643, under an execution sale in the United States court in Iowa, Cromwell bought 1,714 shares of the railroad stock for $50, for which the marshal executed his bill of sale. Cromwell then filed his bill to compel the railroad and a county to transfer the stock to him. The

stock was worth either $32,000 or nothing. Upon appeal this court, in an opinion by Justice Bradley, ordered the bill dismissed, and said:

> * * * The stock would have been nothing but an empty name, and the attempt to keep it afloat for speculative purposes is not such as should recommend it to a court of equity. The parties to such a transaction ought at least to be left to their remedies at law. A court of equity should have no sympathy with any such contrivances to gain a contingent or speculative advantage, if any such is to be gained. * * * He (the complainant) comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of $30,000 worth of stock for which he paid only $50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills for specific performance and in other analogous cases that it is unnecessary to spend argument on the subject.

In *Randolph* v. *Quidnick Co.*, 135 U. S., 457, after the Sprague properties had been assigned and the assignment attacked as invalid in Rhode Island and Connecticut, a creditor attached and under execution bought in stock worth $500,000 for $275 and brought suit to establish title to the stock. Upon appeal, this court affirmed the decree dismissing the bill, and in the opinion by Justice Brewer quoted the above and said:

> The immense disproportion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. Some rights must have suffered and some wrong

> must have been done by such a transaction, and a court of equity properly says it will not lend its aid to further such an unconscionable speculation. * * * It is a case where equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken.

These cases state principles always acted upon, and the books are full of cases applying them. To grant specific performance as substantially prayed for in this bill, the contract or right must be shown to be perfectly fair, equal, and just in all its terms, and that it will not work an injury to third persons, nor be harsh nor oppressive, and the complainant must affirmatively show that he comes with clean hands.

> *Pope Manufacturing Co.* v. *Gormully*, 144 U. S., 236-237.
> *Seymour* v. *Delancey*, 6 Johns. Chy., 224.
> Tiedeman Equity, section 497, notes 6-7.

In *Curran* v. *Holyoke Water Power Co.* (116 Mass., 90), the owner of lands sold a lot with such boundaries as would have made the street only 50 feet wide, and later laid out the street 60 feet wide, and sold other lots to persons who built thereon and whose properties would be greatly damaged if the street were contracted to 50 feet.

The court said (p. 92), "his right to a specific performance of the agreement is not absolute, but rests in the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the

case," and specific performance was refused because of the injury to the lot owners; and he was left to sue at law. (*Thomas* v. *Deering*, I Keen, 729.)

To destroy this town would injure the public interests; and for that reason Payne should be left to his suit at law.

Conger v. *Railway Company*, 120 N. Y., p. 32.
Pomeroy Equity, 2d Ed., p. 2165. Note.

It is evident that the actual occupants of the lots would be greatly injured by the action sought by the bill. They are not parties to this suit. If Payne has any right to those lands he can sue the lot occupants in ejectment; or he can sue the Government for its breach of contract, if any. In the cases above cited from the 91 and 135 U. S. the complainants showed a scintilla of recompense, of expenditure, but Payne shows none. They paid $850 and $275, respectively, but Payne pays nothing.

RELIEF AS TO FITZGERALD.

The improper joinder of Fitzgerald in the suit with the town-site trustees, does not give Payne any right to a decree as to this land in any wise. The suit was prematurely brought, as held in the cases cited; was for land Payne shows himself disqualified to take; and any decree as to it in Payne's favor would tend to hamper and injure the trustees and the lot occupants.

The demurrer to the bill was properly sustained, and the decision should be affirmed.

Respectfully submitted.

HORACE SPEED.

JOHN K. RICHARDS,
Solicitor-General.

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